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No.

In The

Supreme Court Of The United States

October Term, 1997

ARKANSAS CHRISTIAN EDUCATORS ASSOCIATION
AND
JAMES L. PARSONS, INDIVIDUALLY AND
AS PRESIDENT OF ACEA,

Petitioner,

v.

OZARKS UNLIMITED RESOURCES COOPERATIVE
AND
DR. LEON MCLEAN, INDIVIDUALLY AND
AS DIRECTOR OF OUR,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Was Eleventh Amendment sovereign immunity and qualified immunity improperly granted to a state's independent political subdivision and the subdivision's employee and was equitable and prospective relief improperly denied to Petitioners where the subdivision is exclusively concerned with local rather than state issues, receives substantial revenues from private sources and local tax assessments, has its own proprietary sales function which generates over $400,000.00 in annual revenues, and where it is governed by its own independent, local board empowered to set policy, make contracts, and hire and fire?

II. Do the First and Fourteenth Amendment rights to free speech, freedom of religion, and equal protection apply to persons ejected for expressing personal and religious viewpoints on issues of public concern at an exhibition ancillary to a workshop held for public school teachers?

III. Should an exhibition established by a state's political subdivision properly be classified as a public or limited public forum, where the subdivision invited the speakers/exhibitors to set up an exhibit, the exhibit and speech included topics under consideration in the workshop at large, and where the speakers/exhibitors were expelled clearly based upon the content or viewpoint of their speech?

SUP. CT. RULE 29.6 STATEMENT

Petitioners do not have any corporate affiliations. THE RUTHERFORD INSTITUTE, ("TRI"), is a *pro bono* civil rights organization which facilitates the representation of Petitioners and other persons on free speech, religious rights and other civil rights issues. TRI does not have any parent company or subsidiaries, but is a nonprofit corporation.

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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Arkansas Christian Educators Association and James L. Parsons, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the decision of the District Court granting summary judgment to the Ozark

Unlimited Resources Cooperative and Dr. Leon McLean.

OPINIONS BELOW

The one unpublished Court of Appeals order in dispute affirming the District Court's decision and one published memorandum opinion of the United States District Court are found at *Arkansas Christian Educators Association (ACEA) v. Ozark Unlimited Resources Cooperative (OUR)*, Docket No. 97-2381WA, filed on December 16, 1997, and *Arkansas Christian Educators Association (ACEA) v. Ozark Unlimited Resources Cooperative (OUR)*, Civil Docket No. 96-3055, issued on April 3, 1997. All opinions are reprinted in the Appendix (hereinafter "App.") attached to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on December 16, 1997. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1) and/or Supreme Court Rule 10.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in the Appendix hereto are U.S. Constitution Amendments I, XI, and XIV, Section 1; 42 U.S.C. § 1983; Arkansas Code Annotated § 6-13-1003, Arkansas Code Annotated § 6-13-1012, Arkansas Code Annotated § 6-13-1018, Arkansas Code Annotated § 6-13-1019, Arkansas Code Annotated § 6-17-1113, and Arkansas Code Annotated § 6-61-601.

STATEMENT OF THE CASE

A. Standard of Review

Because the courts below utilized a balancing test involving speech, the Supreme Court reviews *de novo* the facts at issue and the application of law thereto.

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

Connick v. Myers, 461 U.S. 138, 150 n. 10 (1983)(quoting *Pennekamp v. Florida,* 328 U.S. 331, 335 (1946)).

B. Statement of the Facts

James Parsons ("Parsons") and Arkansas Christian Educators Association ("ACEA"), Petitioners, were invited to a workshop held August 16-17, 1995, under the auspices of Respondent Ozark Unlimited Resources Co-op (OUR). OUR is a political subdivision of the State of Arkansas, and receives private funding as well as local, state and federal funds. It has its own governing board of directors, and is largely autonomous. Dr. Leon McLean ("McLean") was Director of OUR at all times relevant to this cause of action,

and both Respondents acted under color of state law.

On July 21, 1995, Parsons sent a letter to schools across Arkansas seeking permission to represent his organization to teachers who attend conferences such as the one held in August 1995 by OUR. Parsons also called the office of Steve Brewer, the Teacher Center Director for OUR, and requested permission to participate as an exhibitor in OUR's workshop. Brewer's secretary took the request, and after apparently checking with proper authority, she advised Parsons that booth space would be available for ACEA. There is a factual dispute about how Parsons defined the ACEA, but the Petitioners assert that the same secretary returned Parsons' call, said she had talked with Brewer, and that he had approved ACEA's participation in the conference. And Brewer tacitly admitted in his deposition testimony given February 17, 1997, that he had "invited" ACEA's participation in the workshop display area.

On Thursday, August 16, 1995, Parsons arrived at the workshop at 7:45 a.m., and went to the location assigned to the ACEA booth. Events proceeded smoothly as Parsons gave out rulers with pictures of the U.S. presidents and a brochure to teachers who visited his booth. Some of the teachers signed up to be on the ACEA mailing list. At about 3 p.m. that first day, an electrical power failure curtailed activities early. Display booth participants were instructed to leave their things as they were, and to return the next morning.

Parsons arrived at the exhibit site at approximately 8:30 a.m. the next day, August 17, 1995, to find that his display had been disassembled and packed away. He found a hand-printed note at his display site indicating that he was being expelled, and upon Parsons' inquiry Respondent

McLean confirmed his ejection of the Petitioners. Although Respondents have asserted that the Petitioners were expelled because their material regarding outcome-based education was contrary to what the majority of teachers in the district believed, the deposition testimonies of McLean and Brewer clearly demonstrate that a primary motive was their disapproval of the religious content of ACEA materials. Shortly thereafter, Steve Brewer, Teacher Center Director for OUR, echoed the expulsion. Respondents offered no proof that Petitioners were the cause of any complaints about religious comments or materials at the workshop. Rather, the only evidence of religious complaints relate to comments made by the opening assembly's keynote speaker, Jim Fisk, who was invited to speak by the Respondents and was not associated with the Petitioners.

C. Proceedings and Decisions in the Courts Below

The Petitioners filed suit on July 29, 1996, for injunctive and declaratory relief as well as a claim for damages, contending that whether they were expelled because of their views on outcome-based education or their religious views, the Respondents' actions violated the Petitioners' rights to free speech, free exercise of religion, and equal protection as guaranteed by the First and Fourteenth Amendments to the U. S. Constitution, the Arkansas constitution, and 42 U.S.C. § 1983.

On April 3, 1997, the United States District Court for the Western District of Arkansas granted summary judgment for the Respondents (App. 36). By improperly construing all facts in the light most favorable to the moving party, the Respondents, the District Court held that Respondent OUR is an arm of the state entitled to Eleventh Amendment immunity, that the Petitioners had no clearly established right

to free speech, and that Respondent McLean was entitled to qualified immunity. The trial court also held that the forum in this case was a non-public forum, and that the Respondents were thereby justified in expelling the Petitioners. Memorandum Opinion, App. 32-34. On April 24, 1997, the trial court denied the Petitioners' Motion for Reconsideration, and on May 13, 1997, the Petitioners filed their Notice of Appeal.

The Petitioners took their direct appeal to the United States Court of Appeals for the Eighth Circuit. In an unpublished *per curiam* opinion filed in Case No. 97-2381WA on December 16, 1997, the Eighth Circuit affirmed the trial court's ruling "substantially for the reasons stated in the district court's memorandum opinion." App. 1-2.

Petitioners seek certiorari from this Honorable Court.

REASONS FOR GRANTING THE WRIT

In light of the many decisions from this Court that support a careful scrutiny of any governmental interference with the rights of free speech, including religiously-motivated speech, the present action by the state's political subdivision to expel persons whose viewpoints are contrary to the majority's accepted view should be reversed. The practice of applying sovereign immunity to local governing bodies to avoid constitutional jeopardy has become increasingly commonplace and warrants this Court's review. Under the prior decisions of this Court, the judgment of the district court and the Eighth Circuit appellate court are erroneous. *Certiorari* is justified and should be granted.

ISSUE I. The Lower Courts Improperly Granted Summary Judgment Based on Sovereign

Immunity to the Respondents Where the Respondent Ozark Unlimited Resources Cooperative is Exclusively Concerned with Local Rather than State Issues, Receives Substantial Revenues from Private Sources and Local Tax Assessments, Has its Own Proprietary Sales Function Which Generates Over $400,000.00 in Annual Revenues, and Where it is Governed by its Own Independent, Local Board Empowered to Set Policy, Make Contracts, and Hire and Fire.

A. Harsh and Erroneous Application of Summary Judgement

Summary judgment is a harsh remedy and was not appropriate in this case. The moving party must demonstrate the absence of any genuine issue of material fact, "and the evidence submitted to the court 'must be viewed in the light most favorable to the opposing party.'"[1] The District Court erroneously considered all factual disputes in the light most favorable to the Respondents, the movant for summary judgment, and resolved all doubts in their favor in clear contravention of all applicable caselaw. Contrary to the Respondents' assertion and the District Court's judgment entered on April 3, 1997, there are several genuine, clearly disputed issues of material fact in this case, including:

1. the facts which prove or disprove the Respondents' claim of Eleventh Amendment

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[1] *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180 (8th Cir. 1976)(*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

immunity;

2. the facts which establish whether McLean is entitled to qualified immunity;

3. whether OUR has a custom or policy which violates the Petitioners' constitutional rights;

4. whether the Petitioners have clearly established rights to free speech, free exercise of religion, and Fourteenth Amendment equal protection which were violated; and

5. what type of forum was created by the Respondents' workshop to which the Petitioners were invited.

The Respondents' motion for summary judgment and proofs on those issues failed to meet the level of proof required by *Pfizer* and *Adickes*. Therefore, summary judgment was improper and should be reversed.

B. Contrary to the judgement of the lower courts, Respondent is not a "state" nor is it an arm of the state, and the Eleventh Amendment to the United States Constitution should not shield Respondent from suit.

The following factors are to be considered in determining whether an entity is entitled to immunity under the U.S. Constitution's Eleventh Amendment as an arm of the state:

1. Local law and decisions defining the status

and nature of the agency involved in its relation to the sovereign;

2. **most importantly,** whether the payment of the judgment will have to be made out of the state treasury;

3. whether the agency has the funds or the power to satisfy the judgment;

4. whether the agency is performing a governmental or proprietary function;

5. whether it has been separately incorporated;

6. the degree of autonomy over its operations;

7. whether it has the power to sue and be sued and to enter into contracts;

8. whether its property is immune from state taxation; and

9. whether the sovereign has immunized itself from responsibility for the agency's operations.[2]

There is a wealth of evidence in the instant case to substantiate that Respondent OUR is the equivalent of an

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[2]*Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1307 (3rd Cir. 1987). *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Folse v. Delgado Community College*, 776 F. Supp. 1133, 1137 (E.D. La. 1991); *Hadley v. North Ark. Community Tech. College*, 76 F.3d 1437 (8th Cir. 1996).

independent, political subdivision of the State of Arkansas which is not entitled to Eleventh Amendment immunity.[3]

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[3] The following facts show the independent nature of the cooperative:

A. According to pages 233-267 of OUR's 1995-1996 ANNUAL REPORT, the Respondent's funding sources include the National Science Foundation, assessment of local school districts, private sources such as the Rural Electrification Administration (REA), Millbrook Corporation, Alltel Corporation, North Arkansas Telephone Company, Tri-County Telephone Company, federal funds channeled directly to OUR, Arkansas Better Chance Program block grants, local tax assessments, private grants, and state and federal grants. ARK. CODE ANN. § 6-13-1019. *See,* App. 40.

B. The same ANNUAL REPORT states that base funds from the State of Arkansas fund ONLY the Respondent OUR's basic services, and a portion of the Technology Initiatives with OURNET and TAURUS. Although Respondent McLean offered self-serving testimony in his deposition that virtually all funding is from the state, Respondent OUR's 1995-1996 Annual Report gives ample evidence that the testimony was not accurate.

C. It is well known that local school district funds in Arkansas are generated by local property taxes and millage rates pursuant to ARK. CODE ANN. § 6-61-601 *et.seq.* *See,* App. 42. Those taxes are collected by local authorities under Arkansas law.

D. The payment of any money judgment would arguably be covered by insurance mandated by Act 355 of 1993, codified at Ark. Code Ann. § 6-17-1113, which provides for $250,000.00 worth of civil liability coverage for each incident. *See,* App. 41.

The Respondents urged in their motion for summary judgment that this statute does not apply in the instant case, but they did not deny the existence of

(continued...)

[3](...continued)

insurance coverage which would enable them to satisfy any judgment without crippling the state treasury (a matter of concern to the District Court). *See* Memo. Opin., App. 19-21. This disputed, material fact alone was sufficient to avoid the summary judgment granted by the District Court.

E. Respondent OUR is ***not*** primarily controlled by the state, nor is it governed primarily by state law. The enabling statutes show clearly that the Arkansas Department of Education has only advisory and not plenary power over the cooperatives. The cooperative is governed by its own board of directors from the twenty-one school districts it serves. The board establishes policies, rules and regulations of the cooperative. Even the Respondents admitted in their Brief in Support of Motion for Summary Judgment that OUR's board of directors establishes all of its policies.

F. The Respondent cooperative is a separate corporation, and its board has authority to elect its own executive committee. And many of the programs run by the cooperative "have advisory committees with district and community representation." 1995-1996 OUR ANNUAL REPORT at p. 240.

G. The cooperative clearly has the power and authority to enter into contracts, as amply demonstrated throughout the text of its 1995-1996 ANNUAL REPORT. *See also* ARK. CODE ANN. § 6-13-1018, which states that school districts may enter into contracts with one or more education service cooperatives. *See,* App. 39.

H. Likewise, there is little doubt that OUR has the power to sue. Otherwise, it would be unable to enforce the many contracts into which it enters each year, as evidenced by its ANNUAL REPORT.

I. Page 244 of OUR's ANNUAL REPORT describes the cooperative's equipment repair program through which it repairs "school district classroom and administrative equipment. . . . The service is ***totally***

(continued...)

Directly analagous to *Mt. Healthy*, Respondent OUR

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[3](...continued)

self-supported and has continued to increase dramatically since its inception." The ANNUAL REPORT goes on to describe growth in the operating budget for that program alone from $41,892 in 1991-92, to $485,525 in 1995-96, -- a growth factor of over 1000% in four years.

J. For five years, the cooperative has offered computer sales as a supplement to its repair program, selling over 300 computers and 150 printers in the 1995-96 budget year. It is hard to imagine a more "proprietary" function than the one described in this section of the ANNUAL REPORT, and this factor is further proof of the Petitioners' contention that the Respondent cooperative is NOT primarily funded from state funds.

K. It is equally clear that OUR is primarily concerned with local or regional problems. It is established by local action for service to local school districts, and is restricted by state law so that it can serve no more than nine counties and no more than thirty-five (35) school districts, and there may be "no more than fifty (50) miles distance or approximately one (1) hour of driving time to the area's main offices for ninety percent (90%) of the school districts." ARK. CODE ANN. § 6-13-1003. *See*, App. 38.

L. OUR's director and board administer all the programs, prepare the annual budgets, hire and fire staff and personnel, and even have the authority to approve any state educational agency personnel which the Department of Education may assign to the cooperative. ARK. CODE ANN. § 6-13-1012. *See*, App. 39. Even an alteration of the cooperative's boundaries by the Department of Education is done pursuant to request of a local school district's board of directors. Clearly, the cooperative is largely autonomous.

Cooperative is "more like a county or city than it is like an arm of the State."[4] It is self-governed by its own board, is responsible for its own financial operations and reporting, enjoys wide-ranging autonomy, operates two profitable businesses within its organization, makes contracts on its own without the need for state approval, has the power to sue and be sued, and has full power to hire and fire personnel. Respondent OUR does not bear such a close relationship to the state that a suit against the entity is in reality a suit against the state.

Thus, it is not a "state," nor is it an arm of the state, and the Eleventh Amendment to the U.S. Constitution should not shield the cooperative from suit.[5] Since the OUR Cooperative is not properly entitled to Eleventh Amendment immunity, it is still considered a "person" for purposes of 42 U.S.C. § 1983. Furthermore, Respondent McLean testified in deposition that he was considered a final authority for making policies about who attended, or was to be thrown out of, his workshop. Steve Brewer, Respondent OUR's Teacher Center Coordinator, also testified in deposition that he believed he had authority to remove someone from the forum since he was responsible for putting the program together. So for purposes of determining who did and did not attend the forum in question, McLean and Brewer were both apparently considered final policymakers, another distinct example of local – not state -- control. This Court should grant *Certiorari* and set the lower courts' decisions aside on

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[4]*Mt. Healthy*, 429 U.S. at 280-81; *see also Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985).

[5]*See, Unified School District No. 480 v. Epperson*, 583 F.2d 1118 (10th Cir. 1978); *Edelman v. Jordan*, 415 U.S. 651 (1974).

that issue.[6]

C. This Court Should Grant *Certiorari* to Address Respondents' Policy of Denial of Rights.

The decision to evict the Petitioners reflected a well-defined policy of the Cooperative, at least as far as its Director and Teacher Center Coordinator were concerned. Mr. Brewer testified that, "...I doubt if I would have allowed them into the conference if I had known the positions that they took." The only logical inference to be drawn from that statement and the facts of this case is that there is a policy, albeit unwritten, of expelling anyone who brings an unacceptable viewpoint into the forum.

Regarding liability for decisions by municipal policymakers, this Court has said:

> It is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. . . . Monell's language makes it clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy, ..." [A] government frequently chooses a course of action tailored to a particular situation and not intended to

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[6]Of singular importance is the District Court's observation in its April 3 Memorandum Opinion, that neither litigant provided "any specific information on the percentage of the overall budget that comes from funds other than those provided by the state." App. 20. That question involves another genuine issue of material fact which warrants reversal of the summary judgment.

> control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood.[7]

The *Pembaur* principle applies here. Respondent OUR is the equivalent of a municipality, and McLean and Brewer both had the authority to make the decision to expel the Petitioners from the exhibition. Brewer's indication that he would not have allowed the Petitioners to come in had he known their positions is indicative of an overt policy of viewpoint discrimination. Moreover, the decision to expel the Petitioners created a policy of tossing out all people whose speech does not track the official views.

Denying to Petitioners initial access into the workshop might have been a permissible choice for the Respondents in this case. But once admission was granted, expulsion based on the content of viewpoints expressed in print was a violation of clearly-established constitutional rights. This Court should grant *certiorari* and adjudicate the denial of Petitioners' rights.

D. Immunity Claims Notwithstanding, Petitioner is Entitled to Equitable and Prospective Relief.

Neither the Eleventh Amendment nor Respondent

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[7] *Pembaur v. Cincinnati*, 475 U.S. 469, 481-2 (1986)(*citing Monell v. New York City Dept. of Social Services*, 436 U.S. at 691 (1978).)

McLean's qualified immunity claim insulate the Respondents from the Petitioners' claims for equitable and prospective relief.[8] The Petitioners requested equitable and prospective relief by way of a declaratory judgment and injunctive relief, and both claims were improperly denied by the District Court.

ISSUE II: Notwithstanding an Erroneous Application of Qualified Immunity, the First and Fourteenth Amendment Rights to Free Speech, Free Exercise of Religion and Equal Protection Should Apply to Petitioners Who Were Ejected for Expressing Personal and Religious Viewpoints on Issues of Public Concern at an Exhibition Ancillary to a Workshop Held for Public School Teachers.

The Respondents openly stated in their Brief in Support of Motion for Summary Judgment that the opinions expressed by the ACEA at the forum regarding the effectiveness of outcome-based education "are clearly political views entitled to protection under the First Amendment to the United States Constitution." They then argued that "[q]ualified immunity grants immunity from suit under § 1983 unless the public employees' conduct violates clearly established law."

It is difficult to conceive of a more clearly established law than our fundamental right to free speech under the First

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[8] *Grantham v. Trickey*, 21 F.3d 289, 293 (8th Cir. 1994)(*citing Stanley v. McGrath*, 719 F.2d 279, 284 (8th Cir. 1983) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)).

Amendment. "[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."[9] The Respondents implied in their Brief in Support of Motion for Summary Judgment that the Petitioners' allegations pertain to "extremely abstract rights." How abstract are our First Amendment rights?

Juxtaposed against the Respondents' contention is the Eighth Circuit Court of Appeals' holding that, "No right is more clearly established in our republic than freedom of speech."[10] This Supreme Court has frequently given notice that free speech is inextricably woven into the fabric of our national freedom. "The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate.'"[11] "The First Amendment reflects the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[12] The law's protection of robust free speech, even if the speech is religious in nature, was reinforced in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) and *Capitol Square Review & Advisory*

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[9]*Carey v. Population Services Int'l.*, 431 U.S. 678, 701 (1977). *See also Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997).

[10]*Grantham v. Trickey*, 21 F.3d 289, 293 (8th Cir. 1994)(*quoting Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993)).

[11]*Waters v. Churchill*, 511 U.S. 661, 672 (1994)(*quoting Cohen v. California*, 403 U.S. 15, 24-25 (1971) where the Court held that "one man's vulgarity is another's lyric").

[12] *Waters v. Churchill*, 511 U.S. at 672, (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

Board v. Pinette, 515 U.S. 753 (1995).

Thus, the right to freedom of speech, even if the speech personally offends some, is a clearly established and fundamental right which cannot be abrogated with impunity by officials who then attempt to hide behind the skirts of qualified immunity. "The First Amendment exists to protect individuals, not government."[13]

In deposition testimony, Respondent McLean stated that the Petitioners were expelled from the workshop because of divergent views regarding outcomes-based education and religion. Voicing an irrational fear that they would somehow be tainted by an inference that they agreed with the views expressed in materials being offered by the Petitioners, Respondent McLean and Brewer both testified in deposition that the Petitioners were evicted from the workshop because of the Respondents' objection to the religious content of Petitioners' handouts. Such an absurd fear strains at credulity. The Respondents' testimony and arguments for summary judgment plainly demonstrated that they knew they were impinging on the Petitioners' First Amendment rights; so their contention of a "good faith" action is without merit.

The Respondents' actions were state action within the meaning of 42 U.S.C. § 1983 and violated the Petitioners' free speech rights guaranteed by the First Amendment of the U. S. Constitution, 42 U.S.C. § 1983, and the Arkansas constitution. Further, the Petitioners' right to equal protection guaranteeeed by the U. S. Constitution's

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[13] *Forbes v. Arkansas Educational Television Communication Network Foundation*, 93 F.3d 497, 505 (8th Cir. 1996), *cert. granted* 137 L.Ed.2d 326 (1997).

Fourteenth Amendment was abridged, since according to Respondent McLean's deposition testimony, no other persons who engaged in speech concerning religion were evicted from the forum.

As the District Court pointed out, "The Equal Protection Clause protects not only fundamental rights and suspect classifications but also protects citizens from arbitrary or irrational state action."[14] But ignoring the rule that pleadings are to be liberally construed, the District Court concluded that the Petitioners had not sufficiently alleged arbitrary or irrational action. What could be more arbitrary than expelling invitees to a forum simply because their printed viewpoints differed from those of the Respondents? And what could be more irrational than basing such a decision on the perceived fear that the Petitioners' information might cause disagreement among teachers, or that the Petitioners' views would taint the Respondents?

Respondent McLean also expressed in deposition testimony that religion has no place in the public school classroom, but there was no public school classroom involved here. The participants in the exhibit area where the Petitioners' "offensive" speech occurred were teachers and business people, all adults. No chance of corrupting the minds of little children with religion existed.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[15] Education issues are vital items of public concern, and the U.S.

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[14]Memo. Opin., App. 36 (*citing Batra v. Board of Regents of Univ. of Nebraska*, 79 F.3d 717 (8th Cir. 1996)).

[15]*Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Supreme Court long ago recognized that teachers, above all others, should be able to have informed opinions on matters of public concern and should be able to freely debate those opinions.[16] Observing that the "public interest in having free and uninhibited debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment," this Supreme Court stated,

> On such a question free and open debate is vital to informed decisionmaking by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions.... Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[17]

Although *Pickering* involved the retaliatory firing of a public school teacher who published his disagreement with his school board over some bond fund elections, the principle stated is equally as valid in our case. Outcomes-based education is a matter of great public importance. It has been hotly debated across the country since its inception, and after the events which gave rise to this lawsuit, the Arkansas legislature resoundingly reversed the "mandate" for outcomes-based education used by Respondent McLean as justification for expelling the Petitioners from his limited public forum.

Respondents stated their fear that the Petitioners'

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[16] *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[17] *Id.*

expressed opinions on the topic would also cause disruption of the workshop. But apparently it did not, for the Respondents themselves stated in deposition that only a half-dozen or so teachers (of 1,100 in attendance) complained about *anything*, including religion or the ACEA's presence in general. Even if the Respondents' number of alleged complaints is doubled, we have a complaint ratio of about one percent (1%) – hardly enough to be described as a major uprising. And it is patently clear that the objections to religion were not voiced against the Petitioners because the Petitioners were not participants in the larger forum of the workshop.

Therefore, summary judgment on the issue of qualified immunity for Respondent McLean was patently unjustified in this case. He violated a clearly-established right of the Petitioners which has existed in this nation longer than anyone now alive. He claimed a good-faith motive for expelling the Petitioners, but the law looks to an objective standard.[18] Where a content-based restriction of free speech does not arise from a good-faith motive when the restrictor is unaware of his impingement of a clearly-established right, it is improper and impermissible under longstanding constitutional jurisprudence. This Court should grant *certiorari* to reverse the lower courts' order and affirmation of summary judgment and properly ajudicate Petitioners' First and Fourteenth Amendment claims.

ISSUE III: An Exhibition Established by a State's Political Subdivision Should Properly be

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[18]*Davis v. Scherer*, 468 U.S. 183, 194 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Elder v. Holloway*, 510 U.S. 510 (1994).

Classified as a Limited Public Forum Where the Subdivision Invited Speakers/Exhibitors to Display an Exhibit, the Exhibit and Speech Included Topics Germane to the Workshop at Large, and Where the Speakers/Exhibitors Were Expelled Based Clearly Upon the Viewpoint of Their Speech.

Respondent OUR and its personnel created a limited public forum in the exhibit area of their workshop. That narrowly-particularized forum was the venue for which the Petitioners sought and received access. The Respondents acknowledged that the Petitioners' stated opinions are "clearly political views entitled to protection under the First Amendment," but then argued that the right to express those views was somehow lost under the facts in this case. The Respondents made strenuous effort to show that they never intended to create a forum, and that the nature of the Petitioners' speech, when coupled with the Respondents' intentions, somehow entitled the Respondents to expel the Petitioners from the forum to which they had been invited.

This Court has held:

> Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because

public officials oppose the speaker's view.[19]

Nevertheless, the District Court approved, and the Eighth Circuit affirmed, the Respondents' position by finding that the forum offered by the Respondents was a non-public forum from which the Petitioners could be excluded. The courts' findings are erroneous in contravention to established precedent in similar free speech cases. For example, the District Court's Memorandum Opinion at page 29 stated, "In defining the forum, the focus is on the access sought by the speaker."[20] Accordingly, the District Court found that "[h]ere the forum the ACEA sought access to was the workshop."[21] The court did not attempt to distinguish between the workshop and the exhibit hall itself. The District Court's opinion erroneously ignored the plain instruction of *Cornelius v. NAACP Legal Def. & Educ. Fund* as reiterated in *Forbes*, that "If the speaker seeks access to public property, the forum encompasses that property. But **if only limited access is sought**, we must take a 'more tailored approach to ascertain the perimeters of a forum within the confines of the government property.'"[22] In the instant case, the Petitioners sought access to the limited venue of the exhibition area which was opened to many vendors and exhibitors, including a competing teachers union organization. There, the exhibitors sought to do business with the workshop attendees

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[19]Perry, 460 U.S. 37, 46 (emphasis added).

[20]*Citing Forbes v. Arkansas Educ. Television Comm.*, 93 F.3d 497, 503 (8th Cir. 1996)(*cert. granted* 137 L.Ed.2d 326 (1997)).

[21] App. 31.

[22]*Forbes*, 93 F.3d at 503 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985)(emphasis added).

by selling them insurance, craft items, school and office supplies, and memberships in various organizations. It was a limited public forum which gave the participants an opportunity to state their views about various matters of public and private concern via expressive activities, printed materials, and contact with anyone who voluntarily stopped to talk.

The workshop was held at the facilities of the North Arkansas Community Technical College in Harrison, Arkansas,[23] the type of place typically opened by the state "for use by the public as a place for expressive activity."[24] Similar workshops have been held every year since 1991, and other exhibitors and vendors have always been allowed to set up booths and peddle their wares. According to the Respondents' deposition testimony, no one else has ever been expelled based on the content of speech. The workshop attendance included 1,100 teachers, according to Respondent McLean's deposition. At no time did the Petitioners attempt to exercise speech rights in the larger venue of the workshop sessions. Therefore, the speech at issue in this case could not have been disruptive of the workshop sessions. The Petitioners voluntarily and respectfully confined expressive activities to the assigned, "particularized" area which had been opened to them at Respondents' invitation. "Traditionally, when a speaker 'seek[s] access to a particular means of communication,' **it is that particularized forum**

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[23]Referencing lower court record, see Exhibit 2, McLean dep., p. 5.

[24]*See Perry Educ. Assn. v. Perry Local Educ. Assn.*, 460 U.S. 37 (1983).

which becomes the focus of analysis."[25] The *Forbes* court noted that "the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes."[26]

In *Forbes,* the plaintiff was a political candidate who was denied access to participate in a televised debate among other candidates for a congressional seat. The denial was based upon the public television network's decision that Mr. Forbes was not a "viable" candidate. Recognizing that Mr. Forbes had no inherent access right to the airwaves in general, the Eighth Circuit nonetheless held that the public television network had created a limited public forum by staging a debate in which the candidates were to express their views on issues, and that the network's decision to exclude Mr. Forbes was a denial of his constitutional right to free speech. "Surely government cannot, simply by its own *ipse dixit,* define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. . . . The First Amendment exists to protect individuals, not government."[27]

In the instant case, the Petitioners were participating in at least a limited public forum. The Respondents had opened their facility, a public building, for expressive activities, and had annually allowed business people and organizations to set up exhibits for a variety of purposes. Included every year among the exhibitors was the Arkansas

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[25]*Forbes v. Arkansas Educational Television Comm'n,* 93 F.3d 497, 503 (8th Cir. 1996)(emphasis added).

[26]*Forbes,* 93 F.3d at 500.

[27]*Forbes,* 93 F.3d at 504, 505.

Education Association, the state affiliate of the National Education Association. The largest teacher union in the State of Arkansas, they were present at the exhibition for the express purpose of recruiting membership and making their positions known on issues of interest to schoolteachers. Likewise, Parsons and ACEA were there to recruit members and engage in expressive conduct on issues of importance to them, including outcomes-based education.

The analysis applied in *Forbes* is equally applicable to the facts of this case. By opening their doors to expressive activity of the type engaged in by the AEA and the ACEA, the Respondents created a limited public forum. Parsons and ACEA were among the class of speakers invited to the event. Respondent McLean openly admitted in deposition testimony that he expelled Parsons and ACEA because of the content of their speech.

Following its discussion of the free speech fora analysis, the District Court erroneously held that the OUR workshop was a non-public forum and that the Respondents were entitled to deny Petitioner's access, citing as analagous caselaw *Perry*[28] and *Cornelius*.[29] *Perry* involved a dispute between two rival teachers' unions, one of which was denied any access to a school's mail facilities, a nonpublic forum. And the *Perry* court held that there was no inherent right to use of those facilities. Likewise, the Court's quote from *Cornelius* concerns restriction of access to a nonpublic forum.

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[28]*Perry Educ. Assn. v. Perry Local Educ. Assn.*, 460 U.S. 37 (1983).

[29]*Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, (1985).

However, the instant case is not an access case. *Perry* and *Cornelius* are factually distinguishable because the Respondents here invited the Petitioners to participate in the exhibition. There was no denial of access. So the only possible basis for the Petitioners' expulsion was viewpoint discrimination by the Respondents, a violation of free speech. Likewise, the validity of reasonable time, place and manner restrictions of speech does not aid the Respondents' position, because the Petitioners were in the particular place assigned by the Respondents, at the right time. The manner of speech was decent printed material, so there was no legally impermissible form of expression.

Even the District Court's opinion clearly recognized the Respondents' behavior as content-based, viewpoint discrimination. But the District Court reached faulty conclusions about the effect of the Petitioners' speech. "Nevertheless, . . . the evidence shows ACEA was excluded because the content of its literature addressed topics not encompassed within the purpose of the forum, [that is,] the efficacy or validity of outcome-based educational standards and religion in the schools, and because of the disharmony ***allegedly*** created by its close proximity to the AEA."[30] But Respondent McLean's deposition testimony contains his unequivocal admission that he had no proof that the Petitioners' speech caused a disruption which justified expulsion from the meet.

Once again, this Court's words in *Perry* apply, "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public

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[30]Memo. Opin., App. 34 (emphasis added).

forum. . . "[31]

The Petitioners do not contend that they had a fundamental right to access the exhibition. But once access was granted, they could not be tossed out merely because public officials opposed their views. And contrary to the District Court's conclusion, the Petitioners' speech covered topics reasonably encompassed within the narrow forum of the exhibit hall. The Petitioners were merely expressing ideas which distinguished them from the competing teachers' union. Is competition illegal under constitutional analysis? Respondents, citing *Perry*, pointed out in their motion for summary judgment that "[w]hen the speakers are similarly situated, the State may not pick and choose."[32]

The Respondents argued for summary judgment by urging that the Petitioners have no equal protection claim because they do not fall within a suspect class. Equal protection under the law is a fundamental right secured to all U.S. citizens by our founding documents. If the Respondents' argument is the law of the land, then no one except those in suspect classes has any constitutional right to equal protection. The Respondents in this case singled out the Petitioners for treatment not used on anyone else in the history of these workshops. The Respondents' action was nothing less than viewpoint-based denial of the Petitioners' civil rights guaranteed by the First Amendment, and is a classic example of the type of picking and choosing forbidden by *Perry*. Summary judgement on this issue was inappropriate. This Court should grant *certiorari* and set

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[31] *Perry* 460 U.S. 37, 46.

[32] *Citing Perry* 460 U.S. 37, 46.

aside the lower courts' judgment.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2381WA

Arkansas Christian Educators Association (ACEA); James Lee Parsons, Individually and in his representative capacity as President of ACEA,

Appellants,

Ozark Unlimited Resources Cooperative (OUR); Leon McLean Individually and in his representative capacity as Director of OUR,

Appellees,

Appeal from the United States District Court for the Western v.District of Arkansas.

[UNPUBLISHED]

Submitted: December 8, 1997
Filed: December 16, 1997

Before FAGG, BEAM, and MORRIS SHEPPARD

ARNOLD, Circuit Judges.

PER CURIAM.

Arkansas Christian Educators Association and James Lee Parsons appeal an adverse grant of summary judgment on their claims that they were wrongfully excluded from an in-service workshop for teachers and administrators in violation of their First and Fourteenth Amendment rights. Having reviewed the record and the parties' submissions, we conclude that an extensive discussion is not warranted. The district court has written a comprehensive opinion addressing the issues raised by the parties, and we have nothing to add to the district court's analysis. We see no error by the district court and affirm the judgment substantially for the reasons stated in the district court's memorandum opinion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

ARKANSAS CHRISTIAN EDUCATORS ASSOCIATION (ACEA) AND JAMES L. PARSONS, INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS PRESIDENT OF ACEA,

PLAINTIFFS,

v. Civil No. 96-3055

OZARK UNLIMITED RESOURCES COOPERATIVE (OUR) AND DR. LEON McLEAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF OUR,

DEFENDANTS.

MEMORANDUM OPINION

The Arkansas Christian Educators Association (ACEA) and James L. Parsons (Parsons), its president, filed this action against Ozark Unlimited Resources Cooperative (OUR) and Dr. Leon McLean (McLean), its director, under § 1983 alleging violations of federal constitutional rights. 42 U.S.C. § 1983. Specifically, plaintiffs allege their free speech and equal protection rights were violated by the defendants expulsion or removal of the ACEA from a workshop held by OUR on the campus of the North Arkansas Community Technical College.

This case is currently set for trial during the week of April 7, 1997, a mere seven days after this summary judgment motion was ready for decision by the court. In their motion, defendants state they will supplement their motion with pages of deposition transcript after the transcript is received. Given the iminent [sic] trial date, it would not be possible for defendants to supplement their motion and for the plaintiffs to respond to the supplement prior to the trial date.

Background.

Educational service cooperatives, such as OUR, were established pursuant to The Education Service Cooperative Act of 1985. The provisions of this act are codified at Ark. Code Ann. § 6-13-1001 *et seq.* (Repl. 1993). The cooperatives are established "when seventy-five percent (75%) of the school districts in a proposed cooperative area request such action by formal resolutions filed by the school district boards of directors with the Director of General Education." Ark. Code Ann. § 6-13-1004(a). OUR consists of twenty-one member districts in a seven-county area. *Plaintiffs' Exhibit 3, OUR 1995-96 Annual Report Preface.*

Along with the resolution, each district requesting establishment of the cooperative must "indicate by name or position that district's representative on the board of directors of the proposed education service cooperative." Ark. Code Ann. § 6-13-1004(b). The cooperative is then governed by a board of directors consisting of one representative of each school district within the boundary of the cooperative. Ark. Code Ann. § 6-13-1006(a). Each cooperative is to include at least ten but no more than thirty-five school districts. Ark. Code Ann. § 6-13-1003(b)(2).

The cooperatives are to be "intermediate service units in the state's elementary and secondary education system and as such shall be eligible to receive and expend funds from state and federal governments, school districts, and other public or private sources." The responsibilities of the board of directors include the: (1) "[e]stablishment of policies and procedures for the operation and management of the education service cooperative which shall be in written form and shall be filed with the State Board of Education;" (2) "[p]reparation of an annual budget estimating income and expenditures for programs and services in accordance with procedures established by the State Board of Education;" (3) "[r]eceipt and expenditures of funds needed to provide programs and services in the area;" (4) employment of personnel "as may be required to provide the services requested by the school districts in the area;" (5) "[i]mplementation of policies established by the State Board of Education for the operation of education service cooperatives;" and (6) "[r]enting, leasing, or receiving by gift such facilities and buildings as may be required to provide authorized programs and services." Ark. Code Ann. § 6-13-1006(d).

With respect to personnel, such personnel are to "be employed in accordance with laws, rules, regulations, and procedures applicable to the school districts of this state." Ark. Code Ann. § 6-13-1011(a). With the approval of the cooperative's governing body, "the directors in the Department of Education may assign state educational agency personnel" to the cooperative. Ark. Code Ann. § 6-13-1012.

In addition to the directors' responsibilities with respect to the development of policies, the applicable statutes provide that

> [t]he State Board of Education shall develop such policies, rules, and regulations as may be needed for the proper administration of this subchapter consistent with the need to support and assist education service cooperatives in the delivery of services to school districts and with prudent use of available human and financial resources.

Ark. Code Ann. § 6-13-1013(a). "Such policies, rules, and regulations shall include, but not be limited to, those concerns that keep the education service cooperatives operating within appropriate state and federal laws and serve as guides for settling possible disputes between school districts and in equity or jurisdictional matters relating to shared assets and services." Ark. Code Ann. § 6-13-1013(b).

The policies and procedures for each cooperative "shall be filed with and approved by the State Board of Education." Ark. Code Ann. § 6-13-1020(a)(1). A report must be filed by June 1 of each year, and the report is to include a record of the cooperative's employment policies and practices. *Id.* "Reports of receipts and expenditures shall also be filed with the State Board of Education on forms provided and time schedules set by the Director of General Education." Ark. Code Ann. § 6-13-1020(a)(2). The cooperative is also subject to annual audits by the Legislative Joint Auditing Committee. Ark. Code Ann. § 6-13-1020(a)(3).

Each cooperative is to establish a "teacher center which will provide, consistent with funds available, curriculum development assistance, educational materials, and staff development services to teachers within the school districts in the service area." Ark. Code Ann. § 6-13-

1008(a). A teacher center committee composed of at least one representative from the staff of each school district, advises "the director of the governing body on staffing, programs, and operation of the teacher center." Ark. Code Ann. § 6-13-1008(b).

The cooperatives are to provide

> to school districts which choose to use them assistance in: (1) Meeting or exceeding accreditation standards and equalizing educational opportunities; (2) Using educational resources more effectively through cooperation among school districts; and (3) Promoting coordination between school districts and the Department of Education in order to provide services which are consistent with the needs identified by school districts and the educational priorities of the state as established by the General Assembly or the State Board of Education.

Ark. Code Ann. § 6-13-1002(b). "The programs and services of each education service cooperative shall be based upon the needs of the school districts included in its service area and upon the educational priorities of the state." Ark. Code Ann. § 6-13-1017(a).

Each school district within the service area is entitled to "participate in those programs and services which are fully supported by state funds." Ark. Code Ann. § 6-13-1018(a). School districts may also enter into contracts with the cooperative "for services supported partially or completely by local school funds." Ark. Code Ann. § 6-13-1018(c).

The state provides the basic funding for the cooperatives. Specifically, the state is required to "provide funds to support the basic structure of the education service cooperatives . . . ." Ark. Code Ann. § 6-13-1019(a). This structure includes:

> (1) Salaries and fringe benefits for a director, a teacher center coordinator, and support staff; (2) Costs such as travel, utilities, rent, equipment, and supplies; (3) Funds to support staff and curriculum development activities; and (4) Funds in an annual amount not to exceed twenty-five thousand dollars ($25,000) for the travel expenses of itinerant personnel employed by the education service cooperative to serve the part-time needs of local districts.

Ark. Code Ann. § 6-13-1019(b).

According to McLean, "[v]irtually all the maintenance and operations funding for OUR is from state funding." *McLean Affidavit at ¶ 4.* While OUR does receive other funds in the form of grants from the state or federal government, "categorical and restricted federal and state grants are primarily utilized for program funding." *McLean Affidavit at ¶ 4.*

According to the applicable statute, "[c}ategorical state or federal funds may also be assigned to any education service cooperative upon approval of its governing body and under conditions set by the State Board of Education." Ark. Code Ann. § 6-13-1019(d). Each cooperative is eligible to "receive and expend public and private funds." Ark. Code Ann. § 6-13-1019(e). Further, school districts may contract with the cooperative "for services and part-time personnel to

be supported in whole or in part by local funds, but no school district shall be assessed a membership fee." Ark. Code Ann. § 6-13-1019(c).

In 1995, OUR staff planned an annual pre-school workshop to be held on August 16 and 17, 1995, on the campus of North Arkansas Community Technical College. *McLean Affidavit at ¶ 4.*

> The programs for the workshop were distributed only to the teachers and administrators in the member school districts of the Co-op and for the purpose of pre-registration for the 300 plus inservice sessions offered by the workshop during those two days. There were no other advertisements or invitations to the general public, and the general public did not attend.

Id. Exhibitors were required to obtain permission to set up a booth at the inservice training workshop.

The primary purpose of the workshop was in McLean's words, "to provide a positive, motivational 'jump-start' for teachers and administrators—not to debate political, or otherwise adversarial issues." *McLean Affidavit at ¶ 5.*

Steve Brewer, OUR teacher center coordinator, gave approval for ACEA to participate in the inservice conference. *McLean Affidavit at ¶ 6.* Parsons apparently called Brewer's office, spoke with his secretary, and requested permission to participate in OUR's workshop. Parsons was later advised by the same secretary that Brewer had approved ACEA's participation in the workshop.

This permission was allegedly granted in reliance on the "false assertion" by Parsons that the ACEA was a "sister organization to the AEA [Arkansas Education Association]." *McLean Affidavit at ¶ 6.*[1] ACEA is an organization for "Christian and conservative educators."[2]

On August 16, 1995, Parsons was allowed to maintain a booth at the inservice workshop. Parsons apparently gave out rulers and a brochure to teachers who visited the booth. Additionally, he had a sign up sheet for teachers wishing to be on ACEA's mailing list. At around 3:00 p.m. the workshop was adjourned for the day because of a loss of electricity to the building. When Parsons returned to the workshop on August 17, 1995, he found his display had been dismantled and his literature removed. A handwritten note left at the display site, advised Parsons of his ejection from the workshop.

Upon inquiry, Parsons was told to see McLean. McLean told Parsons he would not be allowed to further participate in the workshop. Plaintiffs contend this expulsion was the result of the disapproval of McLean and Brewer of the religious content of the ACEA materials.

McLean first became aware of the ACEA and the controversy surrounding its participation in the workshop at the end of the first day during a staff briefing. Prior to making any decision, McLean reviewed the literature being distributed by Parsons, spoke with Brewer about complaints

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[1] In plaintiffs' response they indicate that there is a factual dispute as to how Parsons defined the ACEA.

[2] Defendants' statement of undisputed facts #3. Plaintiffs in their response do not dispute this statement.

being voiced, and reviewed teacher evaluations of the workshop. According to McLean, half a dozen or so teachers had made written comments "to the effect that I don't think the in-service program ought to reflect religious views. That religion ought to be kept out of in-service programs." *McLean Deposition at 15.* To McLean's knowledge, no religious materials had ever been presented at a workshop before. *McLean Deposition at 29.*

Brewer had received approximately half a dozen phone calls from teachers complaining that ACEA had been invited to the workshop and about the positions ACEA took. *Brewer Deposition at 24.* Brewer doubted that he would have allowed ACEA into the workshop had he known the positions they took. *Brewer Deposition at 26.* Brewer was concerned about the religious content in the literature being displayed and distributed by ACEA. *Id.* at 20.

McLean concluded that the literature denounced the use of learner outcomes and was inappropriate for dissemination. As a result, ACEA was not allowed to maintain a booth on August 17, 1995. McLean asserts:

> [t]his was a determination made solely by me on the basis of a negative atmosphere caused by the presence of Mr. Parsons and his literature, as was reported to me by my staff, and which was validated by my review and analysis of the ACEA material being disseminated. I also reviewed several comments made by teachers in their evaluation forms of the conference stating that religion should not be part of the workshop, and received several complaints that night from participants in the workshop. Mr.

> Brewer also called me that evening to advise me that he had received complaints. Therefore, based upon my honest and good faith belief that the participation and actions of Mr. Parsons and the literature of the ACEA were inappropriate for this Co-op inservice workshop, which was designed solely to prepare administrators and teachers who work within the Co-op for the implementation of the state mandated learner outcomes, I asked him to remove his materials from the exhibit hall and contact me. Neither Mr. Parsons nor the ACEA was prevented or restricted from distributing their literature, pamphlets, or leaflets outside the exhibit hall, or otherwise soliciting workshop participants for membership in the ACEA.

McLean Affidavit at ¶ 6. McLean's reference to "state mandated learner outcomes," is apparently a reference to Act 236 of 1991, codified at Ark. Code Ann. § 6-15-1001 *et seq.* (Repl. 1993), which provides for the implementation of learner outcome standards, also known as outcome-based education. The ACEA and Parsons are opposed to outcome-based education.[3]

Among the literature Parsons displayed at the ACEA exhibit was a book authored by Brannon Howse entitled: "An Educational Abduction: Do You Know What Your Child Is Being Taught?" The front also contains the following: "Outcome-Based Education/Goals 2000

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[3] Defendants' statement of undisputed facts #6. Plaintiffs in their response do not dispute this statement.

Educational Indoctrination." The book purports to "map out strategies for Christian parents to use in combating the most powerful force in America today: the well-funded educational establishment." *Defendants' Exhibit B.*

The book contains chapters entitled, *inter alia*: (1) America 2000: A Womb to Tomb Plan; (2) Achieving Mediocrity: Outcome Based Education; (3) Quest International: Keeping Parents in the Dark; (4) Robbed of Innocence: Sex Education's Hidden Agenda; (5) The Subtle Abduction: Why They Want Your Children; and (6) Impressions: Breeding Ground for the Occult. The book also contained interviews with William Bennett, Gary Bauer, Jack Kemp, Congressman Robert Dornan, and Phyllis Schlafly.

Defendants have now moved for summary judgment. First, defendants contend OUR is funded and controlled by the State of Arkansas and as such is an arm of the state entitled to Eleventh Amendment immunity. Second, defendants contend the plaintiffs have failed to allege either an express or an implied "custom or policy" as a basis for OUR's liability under § 1983. Third, defendants assert that plaintiffs have failed to show that by being excluded from participation in the workshop their First Amendment or equal protection rights were violated. Fourth, defendants contend McLean in his individual capacity is entitled to qualified immunity.

Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme

Court has issued the following guidelines for trial courts to determine whether this standard has been satisfied.

The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). *See also Agristor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987); *Niagara of Wisconsin Paper Corp. v. Paper Industry Union - Management Pension Fund*, 800 F.2d 742, 746 (8th Cir. 1986).

The Eighth Circuit Court of Appeals has advised trial courts that summary judgments should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). In *Counts v. M.K.-Ferguson Co.*, 862 F2d 1338 (8th Cir. 1988), the court, reviewing the burdens of the respective parties, stated:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, '[to] point[] out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out

> the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339, *quoting, City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted) (brackets in original).

However, the Court of Appeals for this circuit has also held that the court, in ruling on the motion for summary judgment, must give the non-moving party "the benefit of the reasonable inferences that can be drawn from the underlying facts." *Fischer v. NWA, Inc.*, 883 F.2d 594, 598 (8th Cir. 1989) (*citing Trnka v. Elanco Products Co.*, 709 F.2d 1223 (8th Cir. 1983), *cert. denied*, 495 U.S. 947 (1990).

Discussion.

As noted above, defendants have moved for summary judgment on a number of grounds. We will address each in turn.

1. Eleventh Amendment Immunity.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

"The Eleventh Amendment prohibits a citizen from suing a state for money damages in federal court." *Hopkins v. Saunders,* 93 F.3d 522, 526 (8th Cir. 1996) (citations omitted). *See also Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 113 S. Ct. 684, 688-89, 121 L.Ed.2d 605 (1993) (Eleventh Amendment withdrawal of jurisdiction effectively confers immunity from suit); *Edelman v. Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed.2d 1121 (1944).

Moreover, the Eleventh Amendment cloak of immunity covers more than just the state itself. An agency, commission, or board, for example, may also be immune from suit if the entity bears such a close relationship to the state that a suit against the entity is in reality a suit against the state. *Edelman, supra; Hopkins,* 93 F.3d at 526. "A state official is entitled to Eleventh Amendment immunity if immunity will 'protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.'" *Hopkins,* 93 F.3d at 526, *quoting, Hadley v. North Arkansas Community Technical College,* 76 F.3d 1437, 1438 (8th Cir. 1996), *cert. denied,* ____U. S. ____, 117 S. Ct. 1080 (1997).[4]

This doctrine, sometimes referred to as the arm-of-the-state doctrine, bestows sovereign immunity on state governmental agencies that operate as alter egos or instrumentalities of the state. The extent of Eleventh

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[4] Denial of Eleventh Amendment immunity is appealable under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 113 S. Ct. 684, 121 L.Ed.2d 605 (1993).

Amendment immunity is a question of federal law. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990).[5]

The determination of whether a particular entity is an arm-of-the-state must necessarily be made on a case by case basis upon review of the individual state laws involved. *Sherman v. Curators of University of Missouri*, 16 F.3d 860, 863 (8th Cir. 1994). "In making this determination courts consider as a critical factor whether any judgment rendered against the entity would ultimately come out of state funds." *Sherman*, 16 F.3d at 863.

In *Sherman* the Eighth Circuit also cited with approval the following factors delineated in *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303 (3d Cir. 1987): (1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations. *Kovats*, 822 F.2d at 1307.

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[5] The state may, of course, waive its Eleventh Amendment immunity by giving its consent to being sued. *Parden v. Terminal Ry. Of Ala. State Docks Dept.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964).

Other interrelated factors include the degree of state control and supervision over the entity; the source of funds for the entity including the ability of the entity to issue bonds and levy taxes on its own behalf; whether the entity is concerned primarily with local, as opposed to statewide, problems; and whether the entity has the right to hold and use property. *See e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); *Folse v. Delgado Community College*, 776 F. Supp. 1133, 1137 (E.D. La. 1991).

The Eighth Circuit, in remanding *Greenwood v. Ross, supra*, placed emphasis on two factors in determining whether an entity is the *alter ego* of the state for Eleventh Amendment purposes. The panel directed the district court to:

> [e]xamine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit in reality is a suit against the state. Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury.

Greenwood, 778 F.2d at 453, *quoting, Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5th Cir. 1982). *See also Hadley*, 76 F.3d at 1438.

Thus, "[t]he issue is whether [OUR] 'is to be treated as an arm of the State . . . or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.'" *Hadley*, 76 F.3d at 1438, *quoting, Mt. Healthy*, 429 U.S. at 280. The key

inquiry is whether a judgment against the institution must be paid from state funds, or whether it can be paid from nonstate sources under its discretionary control. "The relevant funding inquiry cannot be whether [OUR] enjoys some non-state funding . . . because then most state departments and agencies . . . would be denied Eleventh Amendment immunity." *Hadley*, 76 F.3d at 1441. Even if the entity could initially satisfy a judgment from non-state funds, if the judgment would then "produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury" the action "'is in essence one for the recovery of money from the state.'" *Hadley*, 76 F.3d at 1441, *quoting*, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 463-64, 65 S. Ct. 347, 89 L.Ed.2d 389 (1945).

The factors that weigh heavily on the question of financial autonomy are the extent of state funding, the state's oversight and control of the entity's fiscal affairs, the entity's ability independently to raise funds, whether the state taxes the entity, and whether a judgment against the entity would result in the state increasing its appropriations to the entity. *Kashani v. Purdue University*, 813 F.2d 843, 845 (7th Cir. 1987).

We have detailed above the statutory enactments concerning the funding and supervision of OUR. It seems clear that OUR is both financially and institutionally an arm of the state and that any damage award to plaintiffs would inevitably be paid from the state treasury. *Hadley*, 76 F.3d at 1440. While OUR is empowered to accept donated funds and funds from other federal, state, or local entities, it appears these funds are utilized, and many dedicated, to specific programs and cannot be used for general operating expenses or to pay judgments.

The court is troubled by the fact that neither side has provided the court with any specific information on the percentage of the overall budget that comes from funds other than those provided by the state. However, McLean does assert that "[v]irtually all the maintenance and operations funding for OUR is from state funding" and that "categorical and restricted federal and state grants are primarily utilized for program funding." *McLean Affidavit at ¶ 3.* Further, we are advised that funding for cooperatives was provided by a line item appropriation by the Arkansas General Assembly. *Id.*

In opposing this portion of the motion, plaintiffs contend that the facts show OUR is funded from many sources, including local, state, federal, and private funds. Plaintiffs refer the court to portions of the 1995-96 OUR annual report which cites [sic] sources of funds including the National Science Foundation, assessment of local school districts, private sources, federal funds channel directly to the cooperative, Arkansas Better Chance Program block grants, the Rural Electrification Administration, Millbrook Corporation, Alltel Corporation, North Arkansas Telephone Company and Tri-County Telephone Company. However, the portions of the annual report which identify these diverse sources of funding are specific programs provided by OUR such as the early childhood education program; the "Hippy" program; the Northwest Arkansas Regional Partnership for Arkansas Math, Science, and K-4 Crusades; and Technology Initiatives with Ournet and Taurus.

OUR does not have the power to tax or issue bonds. However, OUR does have the power to raise funds, enter into contracts with school districts, seek and accept donations and grants, and to acquire, own, lease, use and operate property.

Moving to the less important question of state control, there is a significant amount of state control over OUR and its activities. Clearly OUR is subject to the supervision of the State Board of Education. While many of the functions and decisions of the cooperative are within the control of the appointed representative board, the board must operate within the guidelines and under the supervision of the State Board of Education.

Plaintiffs suggest that OUR's governing board of local directors enjoys substantial autonomy within the geographic area of its authority. Plaintiffs point to the statutory grant of authority to the governing board of directors, Ark. Code Ann. § 6-13-1004, and the fact that the cooperative's board has the statutory authority to develop the policies, rules, and regulations of the cooperative, Ark. Code Ann. § 6-13-1006(d)(2). Plaintiffs discount the fact that the State Board of Education also possesses significant statutory authority in this regard. *See supra* the provisions of Ark. Code Ann. § 6-13-1013. Additionally, all such policies must be filed with the State Board of Education and must be consistent with the goals and policies set by the state board and the state legislature.

While OUR does enjoy a limited degree of autonomy, this factor is entitled to less weight than the source of funds. As noted above, the key inquiry in assessing an entity's status under the Eleventh Amendment is whether any judgment against it would necessarily be paid with state funds.

Based on the evidence before us, we conclude that any damage award in this case would be paid directly out of the state treasury or would directly affect the state treasury. It appears, OUR has very few resources that could truly be

classified as discretionary and would be available to pay a judgment in this case or in any other case. In sum, when the court balances the factors set forth above in light of OUR's situation, we conclude that OUR is entitled to Eleventh Amendment immunity.

Of course, as plaintiffs correctly point out, Eleventh Amendment immunity only applies to the claim for money damages against OUR and against McLean in his official capacity. It does not apply to plaintiffs' claims for declaratory or injunctive relief or to plaintiffs' request for monetary damages against McLean in his **personal** or **individual** capacity.

2. Existence of a Custom or Policy.

Next, defendants argue OUR had no unconstitutional policy or custom, express or implied, which violated the rights of the ACEA and Parsons. They point out that an action against the officers of a public entity in their official capacities is tantamount to an action against the public entity itself. Defendants contend McLean did not possess final authority to establish policies for OUR since those policies are established by the board and approved by the State Department of Education.

Plaintiffs argue that the provisions of § 1983 do not require the showing of an express or implied custom or policy which violates the plaintiffs' rights.[6] Even if such a requirement exists, plaintiffs contend defendants' deposition

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[6] Plaintiffs are clearly wrong. Governmental entities can only be held liable under § 1983 for their own unconstitutional or illegal customs or policies. *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). Respondeat superior does not apply.

testimony clearly demonstrates a policy in violation of First Amendment rights. Plaintiffs also suggest that discovery remains to be completed. However, as we noted above, this case is set for trial in less than a week. The discovery cutoff has passed. Plaintiffs' request to amend their complaint to add claims and parties was denied as untimely.

Both parties apparently fail to recognize that once the court has determined OUR is an arm of the state, it is not considered a person for purposes of § 1983. In *Treleven v. University of Minnesota*, 73 F.3d 816 (8th Cir. 1996), the Eighth Circuit noted:

> the Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" when sued for damages. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed. 2d 45 (1989). Thus, assuming that [defendant] is an arm of the state, [plaintiff's] federal-court lawsuit against [defendant] clearly is barred by the Eleventh Amendment, and his suit against [the individual defendant] also clearly is barred insofar as [plaintiff] seeks to recover damages from [the individual defendant in his official capacity.].

Id. at 818 (footnote omitted).

If defendants intended this to be an alternative argument in the event we found OUR not to be an arm of the state, a fact that is not apparent from their motion, we would agree that plaintiffs have failed to establish any basis of liability against OUR for purposes of § 1983. In this case

policy-making authority rests with the board and/or the State Board of Education. Plaintiffs have failed to allege or show the existence of any express or implied custom or policy. Plaintiffs have advanced no evidence to show that McLean, OUR's director, was considered a final policymaker for OUR nor have plaintiffs made any showing that the breadth of McLean's authority and responsibility was sufficient to impose liability on OUR for actions taken in his official capacity. *McGautha v. Jackson County, Missouri, Correction Dep't.*, 36 F.3d 53, 56 (8th Cir. 1994) (citations omitted), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2561 (1995). *See also Marti v. City of Maplewood, Mo.*, 57 F.3d 680 (8th Cir. 1995).

Additionally plaintiffs have failed to advance any proof "that the alleged misconduct was so pervasive among the non-policymaking employee of the municipality 'as to constitute a "custom or usage" with the force of law.'" *McGautha*, 36 F.3d at 56. There is no indication that the alleged custom or policy, if one in fact existed, was "so permanent and well-settled as to constitute a custom with force of law."

3. First Amendment, Equal Protection & Qualified Immunity.

Finally, defendants claim they are entitled to summary judgment on both the First Amendment and equal protection claims. Alternatively, they contend McLean in his individual capacity is entitled to qualified immunity on both claims.[7]

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[7] Denial of a claim of qualified immunity is immediately appealable as a collateral order. *Brayman v. United States*, 96 F.3d 1061 (8th Cir. 1996).

Defendants also argue that as director of OUR, McLean is entitled to a broader immunity than an employee of the cooperative. In support, defendants cite *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974), *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct.992, 43 L.Ed.2d 214 (1975), *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982), and *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1974). We find this letter argument unpersuasive.

With respect to the free speech claim, defendants concede that the opinions expressed by the ACEA at the inservice training program regarding the effectiveness of outcome-based education are clearly political views entitled to protection under the First Amendment. However, as the OUR workshop was, in defendants' opinion, a nonpublic forum, defendants contend they had the right to control access to the forum and draw distinctions based on subject matter and speaker identity so long as the distinctions drawn were reasonable in light of the purpose served by the forum and are viewpoint neutral.

Defendants contend it is clear from the undisputed facts that the activities and literature of the ACEA were incompatible with the intended purpose of the workshop as the ACEA is opposed to the learner outcome standards mandated by the state legislature. In defendants' view, a debate on the efficacy of the learner outcome standards is for a forum other than an inservice training workshop which is designed to help administrators and teachers to understand and implement those mandates. Thus, defendants contend a reasonable official could understand that restrictions on such opposition are warranted in such situations.

In response, plaintiffs argue there is no more clearly established right under federal law than the right of free

speech. They argue it is clear from the depositions of McLean and Brewer that the ACEA was evicted because of the content of the speech. Specifically, plaintiffs contend they were expelled because of the religious content of the speech. *See Brewer Deposition at 20* (there was concern about the religious content of the material).

Further, they argue that defendants created a public forum by inviting the plaintiffs and thereafter violated plaintiffs' rights by singling out the plaintiffs' speech as forbidden. Slightly later in their brief opposing defendants' motion, plaintiffs argue that OUR created a limited public forum in their workshop. They point out that similar workshops have been held every year since 1991 and that other exhibitors and vendors have always been allowed to set up booths and peddle their wares.[8]

According to plaintiffs, no one else has ever been expelled based on the content of speech. As such, they contend McLean is not entitled to qualified immunity. Further, plaintiffs correctly point out that the qualified immunity doctrine does not apply to the claims for equitable relief and that state officials may be sued in their official capacity for equitable relief. *Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994)(citations omitted). In analyzing a qualified immunity claim, the court utilizes a two step analysis. "First, we must determine whether the plaintiff has alleged the violation of a constitutional right.

Second, we must determine whether the right was

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[8] The court has been provided with no information on the types or numbers of vendors or exhibitors participating in the workshop or the topics addressed in the workshop itself.

'clearly established' at the time of the alleged violation." *Edgington v. Missouri Dept. of Corrections,* 52 F.3d 777, 780 n.3 (8th Cir. 1995).

The test for qualified immunity is an objective one: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). If the plaintiff alleges facts that demonstrate a constitutional violation, a court may determine, at the summary judgment stage, whether the alleged conduct violated clearly established law of which a reasonable official would have known. *Warren v. Lincoln,* 816 F.2d 1254 (8th Cir. 1987). Once a court determines as a matter of law that a legal standard governing the governmental action at issue was clearly established, there is no qualified immunity. *Id. See also Bartlett,* 972 F.2d at 914, *quoting, Hunter v. Bryant,* 502 U.S. 224, 112 S. Ct. 534, 537, 116 L.Ed.2d 589 (1991); *Casey,* 12 F.3d at 804, *citing, Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

"To be clearly established, the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.,* 45 F.3d at 1256, *quoting, Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). "Put another way, the specific acts alleged need not have been previously held unlawful, but the unlawfulness of the acts must have been apparent in light of pre-existing law." *Id.* The right at issue must have been clearly established at the time of the violation. *Id.*

The First Amendment guarantees freedom of speech. It protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977). However, even protected speech is not equally permissible in all places and at all times. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.,* 473 U.S. 788, 799, 105 S. Ct. 3439, 87 L.Ed.2d 567 (1985). The First Amendment does not guarantee unlimited access to government owned property for the purpose of expression.

The Supreme Court has grouped government property into three categories for First Amendment purposes: (1) traditional public fora; (2) public fora created by government designation (limited public fora); and (3) nonpublic fora. *See generally United States v. Kokinda,* 497 U.S. 720, 110 S. Ct. 3115, 3119-20, 111 L.Ed.2d 794 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46, 103 S. Ct. 948, 954-56, 74 L.Ed.2d 794 (1983). The extent to which the government may limit access to a forum for purposes of engaging in speech depends on the nature of the relevant forum. *Cornelius,* 473 U.S. at 800.

Traditional public fora, such as public streets or parks, are places that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S. Ct. 954, 83 L.Ed. 1423 (1939). "In a traditional public forum or a public forum by government designation, First Amendment restrictions are subject to strict scrutiny." *Jacobsen v. Howard,* No. 95-4158, ____ F.3d ____, 1997 WL 134597 (8th Cir. March 24, 1997). The government must provide a compelling governmental interest to restrict

access. *Cornelius*, 473 U.S. at 800.

The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, a limited topic, or a limited class of speakers. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

The court looks to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. Consideration is also given to the nature of the property and its compatibility with expressive activity. *Id.* "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983). "[I]n a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir. 1991).

The third category of property is the nonpublic forum, which consists of property not by tradition or designation a forum for public communication. *Id.* In *Perry*, the court was asked to consider whether the First Amendment was violated when a union that had been elected by public school teachers as their exclusive bargaining representative was granted access to the interschool mail system when such

access was denied to the rival union. The court concluded the school mail facilities fell within this third category of property. The court noted there was no evidence that the school mail system was used by the general public; rather, the evidence indicated that permission to communicate through the use of the system had to be secured from the individual building principal. "This type of selective access does not transform government property into a public forum." *Perry,* 460 U.S. at 47.

"Access to a nonpublic forum, however, can be restricted as along as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius v. NAACP Legal Defense and Ed. Fund,* 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L.Ed.2d 567 (1985) (citation omitted).

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral . . . . Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum,. . . or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id., 473 U.S. at 806.

In defining the forum, the focus is on the access sought by the speaker. *Forbes v. Arkansas Educational Television Commission,* 93 F.3d 497, 503 (8th Cir. 1996)(citation omitted), *cert. granted,* ____ U.S. ____, 1997 WL 114947 (March 17, 1997). The question is a "mixed question of law and fact, as to which the answer is obtained by applying legal principles to facts." *Forbes,* 93 F.3d at 502. A "tailored approach" is utilized in determining "what constitutes the forum within the confines of government property." *Texas v. Knights of the Ku Klux Klan,* 58 F.3d 1075, 1078 (5th Cir. 1995). For instance, if a speaker seeks access "'to a particular means of communication,' it is that particularized forum which becomes the focus of the analysis." *Forbes,* 93 F.3d at 503. Here the forum the ACEA sought access to was the workshop.

Plaintiffs contend by arranging the workshop and granting ACEA's request to have an exhibit at the workshop, that defendants created either a public forum or a limited public forum. Given the nature of the forum, the purposes for which it was designed, and the type of information being conveyed to participants, we conclude a public forum was not created.

In *Forbes* the Eighth Circuit recently summarized applicable law on the creation of a limited public forum. The court stated:

> This type of forum has been defined as a forum "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. The Supreme Court has recognized the existence of a

> limited public forum in a number of instances where the State "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers." Examples of limited public forums include university meeting facilities opened for use by registered student groups, and municipal theaters open to theater productions.

Forbes, 93 F.3d at 503 (citations omitted).

> In contrast, a non-public forum is "[public property which is not by tradition or designation a forum for public communication . . . ." A non-public forum is not necessarily transformed into a public or limited public forum even though the State engages in a practice of "selective access," by "allow[ing] some organizations . . . to use the facilities."

Forbes, 93 F.3d at 503.

In this case, we believe the forum created was a non-public forum similar to the forum examined by the Supreme Court in *Perry*. *See also Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L.Ed.2d 299 (1984) (state law which required academic administrators to meet and confer with teachers regarding questions of policies and governance but limited discussions to representatives of the teachers selected by a union did not create a forum of any type). There the Supreme Court held that a public school's internal mail system was a non-public forum even though officials had allowed some community organizations to use the system.

Perry, 460 U.S. at 47. The workshop appears to have similar characteristics to the mail system at issue in *Perry*. The workshop was designed solely for training and discussion of topics related to implementing state mandated educational standards. It was not a forum for individuals or organizations to express their views or beliefs.

With a non-public forum, the issue of whether plaintiffs' First Amendment rights were violated when they were removed from the workshop turns on whether the distinctions drawn were reasonable in light of the purpose served by the forum and were viewpoint neutral. *Cornelius*, 473 U.S. at 806. So long as these requirements are met, control over access to a nonpublic forum can be based on the subject matter. The reasonableness of the government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all the surrounding circumstances. *Cornelius*, 473 U.S. at 806.

While plaintiffs seek to distinguish this case from access cases because access was granted and they were then removed, we do not believe it necessary or appropriate to draw such a distinction. This is especially true in this case because defendants contend permission, or access, was obtained based on plaintiffs' misrepresentations.

In this case, defendants contend they removed plaintiffs because of the negative atmosphere the presence of ACEA was creating and the fact that ACEA opposed the state mandated learner outcome standards. Further, it appears by the deposition testimony of McLean and Brewer that they were also concerned with the religious content of the display materials and the complaints received by teachers because of the failure to keep church and state separate.

While we cannot say the exclusion was not somewhat content based, the standard in non-public forum cases does not focus solely on whether the suppression was content-based but, rather, turns on whether the suppression was reasonable and viewpoint-neutral. In *Cornelius*, the Supreme Court stated that "[a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811.

ACEA was granted access to the workshop. The evidence is conflicting on whether the access was granted based on a misrepresentation regarding the nature of the organization. Nevertheless, once in attendance, the evidence shows ACEA was excluded because the content of its literature addressed topics not encompassed within the purpose of the forum, the efficacy or validity of outcome-based educational standards and religion[9] in the schools, and because of the disharmony allegedly created by its close proximity to the AEA.

We believe defendants are entitled to summary judgment on this claim. In a non-public forum, access can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose of the forum and are viewpoint neutral. Here the ACEA and Parsons sought to address topics not otherwise includible in the program. Alternatively, we hold that McLean in his individual capacity is entitled to qualified immunity.

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[9] The fact that speech is religious does not mean that the speech has less First Amendment protection. *Capitol Square Review and Advisory Board v. Pinette*, 519 U.S. _____, 115 S. Ct. 2440, 132 L.Ed.2d 650 (1995).

With respect to the equal protection claim, defendants argue that plaintiffs have not alleged the existence of any classification based on suspect class or a fundamental right. Instead, defendants contend it appears that plaintiffs are in reality only asserting a violation of their right to free speech. Defendants contend OUR [sic] had no fundamental right of access to the nonpublic forum, *i.e.*, the workshop created by OUR. Under these circumstances, defendants argue they are entitled to summary judgment on this claim. Alternatively, they argue a reasonable official would not believe the actions taken in removing Parsons and the ACEA literature from the workshop amounted to a violation of the Equal Protection Clause.

Plaintiffs contend the expulsion was unfairly discriminatory, based on viewpoint discrimination, and was a clear violation of the plaintiffs' civil rights. Plaintiffs concede they had no fundamental right to access to the workshop. However once access was granted, plaintiffs contend they could not be "tossed out *merely because public officials opposed theirs [sic] views.*" They further argue that they were treated differently from other participants in the workshop who engaged in speech of a religious nature, including public prayer, without being publicly ridiculed or removed from the workshop. Logically, plaintiffs argue it follows that plaintiffs were singled out for treatment not used on anyone else in the history of these workshops.

We agree with defendants that plaintiffs have done nothing more than reassert their free speech claim in the guise of an equal protection claim. However even if an equal protection claim is validly asserted, we believe McLean is entitled to qualified immunity on this asserted Equal Protection claim.

"To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1424 (6th Cir. 1996). The Equal Protection Clause protects not only fundamental rights and suspect classifications but also protects citizens from arbitrary or irrational state action. *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996). Plaintiffs have not challenged a government classification nor have they sufficiently alleged arbitrary or irrational state action. *Association Residential Resources in Minn., Inc. v. Gomez*, 51 F.3d 137, 140 (8th Cir. 1995).

Conclusion.

For the reasons stated, the defendants' motion for summary judgment will be granted by a separate order entered concurrently herewith.

Dated: April 3, 1997

/s/ H. Franklin Waters

United States District Judge

UNITED STATES CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of greivances.

UNITED STATES CONSTITUTION
AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Unite dstates by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES CONSTITUTION
AMENDMENT XIV
SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Unite dstates and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARKANSAS EDUCATION CODE ANNOTATED
TITLE 6 EDUCATION
CHAPTER 13 SCHOOL DISTRICTS
SUBCHAPTER 10 EDUCATION SERVICE COOPERATIVE ACT

§ 1003 BOUNDARIES - - ADJUSTMENTS

(a) The State Board of Education shall establish tentative boundaries for the system of cooperatives authorized by this subchapter.

(b) These education service cooperatives will be established so that:

(1) They include at least three (3) but no more than nine (9) counties;

(2) They include at least ten (10) but no more than thirty-five (35) school districts;

(3) They include at least twenty thousand (20,000) pupils in kindergarden through grade twelve (K-12) average daily membership;

(4) They include at least one (1) postsecondary education institution; and

(5) There is no more than fifty (50) miles distance or approximately one (1) hour driving time to the area's main offices for ninety percent (90%) of the school districts.

(c) The State Board of Education may make adjustments in the boundaries when criteria such as minimum average daily membership and maximum driving distances conflict. However, no more than four (4) of the areas formed may contain fewer than twenty thousand (20,000) students. In no case shall any cooperative be established with fewer than twelve thousand (12,000) pupils.

§ 1012 AGENCY PERSONNEL

With the approval of an education service cooperative's governing body, the directors in the Department of Education may assign state educational agency personnel to that education service cooperative.

§ 1018 PARTICIPATION OF LOCAL SCHOOL DISTRICTS - - CONTRACTS

(a) Each school district within the service area of the education service cooperative shall be entitled to participate in those programs and services which are

fully supported by state funds.

(b) No school district shall be required to participate in any service.

(c) School districts may enter into contracts with the education service cooperative for services supported partially or completely by local school funds.

(d) School districts within one (1) education service cooperative may also contract for services with another education service cooperative.

§ 1019 FUNDING OF COOPERATIVES

(a) The state shall provide funds to support the basic structure of the education service cooperatives established under the provisions of this subchapter.

(b) This structure shall include:

(1) Salaries and fringe benefits for a director, a teacher center coordinator, and support staff;

(2) Costs such as travel, utilities, rent, equipment, and supplies;

(3) Funds to support staff and curriculum development activities; and

(4) Funds in an annual amount not to exceed twenty-five thousand dollars ($25,000) for the travel expenses of itinerant personnel employed by the education service cooperative to serve the part-time needs of local districts.

(c) School districts may contract with their education service cooperative for services and part-time personnel to be supported in whole or in part by local funds, but no school district shall be assessed a membership fee.

(d) Categorical state or federal funds may also be assigned to any education service cooperative upon approval of its governing body and under conditions set by the

State Board of Education.

(e) As a public agency, each education service cooperative shall be eligible to receive and expend public and private funds.

CHAPTER 17 PERSONNEL
SUBCHAPTER 11 INSURANCE

§ 1113 CIVIL LIABILITY INSURANCE

(a) The Department of Education is authorized and directed to establish a self-insurance fund or to negotiate for and procure a group or blanket policy or policies of insurance, or both, insuring education service cooperatives, education service cooperative board members, school districts, school board members, school treasurers/bookkeepers school nurses, school secretaries, substitute teachers, authorized volunteers, volunteers in a registered volunteers program, school custodians, food service workers employed by public schools, bus drivers and mechanics employed by public schools, maintenance personnel employed by public schools, each employee of a public school district, each employee of the Arkansas School for Mathematics and Sciences, and each employee of the Arkansas School for the Deaf and the Arkansas School for the Blind who is required to hold a teaching certificate issued by the Department of Education, each teacher's aide and each student teacher in a public school district, in the Arkansas School for Mathematics and Sciences, or in the Arkansas School for the Deaf or the Arkansas School for the Blind, and each member of the dormitory staff of the Arkansas School for Mathematics and Sciences, Arkansas School for the

Deaf or the Arkansas School for the Blind against civil liability for acts or omissions of each employee or volunteer in the performance of his or her duties as a volunteer or his or her official duties as a school employee, including civil liability for administering corporal punishment to students, in the amount of two hundred fifty thousand dollars ($250,000) for each incident.

(b) The premium on such policy or policies shall be paid annually out of funds in the Public School Fund that are set aside for distribution to the various school districts under Acts 1977, No. 384 [repealed].

(c) The Department of Education shall adopt appropriate rules and regulations necessary to carry out the purposes of this section.

(d) Any school districts previously covered by the self-insurance program of the Department of Education shall be deemed a proper expenditure of state funds.

CHAPTER 61
POSTSECONDARY INSTITUTIONS GENERALLY
SUBCHAPTER 6
COMMUNITY COLLEGES - - FINANCES

§ 601 GENERAL OPERATIONS - - STATE FUNDS

(a) Funds for the general operation of an adequate comprehensive educational program shall be provided by the state.

(b) (1) Prior to the beginning of each biennium, the local board of each community college shall develop an estimate of budget requirements for the operation of the community college for each year of the biennium and shall submit it to the State

Community College Board for review.

(2) The estimate of budget requirements shall include both expected expenditures and incomes.

(c) (1) Based on the estimates submitted by the community colleges and estimates of funds required for additional institutions that may be created during the ensuing biennium, the State Community College Board shall recommend to the General Assembly and the Governor its estimate of funds necessary to support existing community colleges and ones that may be established.

(2) The amount of state revenues to be recommended for the general operation of each community college shall be the difference between the recommended budget and the total of income for general operation, including student fees and any other income except local taxes. The recommended budget for general operation shall be sufficient to provide an adequate comprehensive educational program which serves the needs of the state and the community college's service area as determined by the State Community College Board.

(d) Replacement of initial equipment shall be considered as an operating cost.